

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, <i>et al.</i>,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 05-CV-0329 GKF-SAJ
)	
Tyson Foods, Inc., <i>et al.</i>,)	
)	
Defendants.)	

**DEFENDANTS’ BRIEF IN OPPOSITION TO PLAINTIFFS’
MOTION IN LIMINE TO EXCLUDE TESTIMONY OF
MARCIA WILLIAMS AND RICHARD FORTUNA**

Defendants respectfully oppose Plaintiffs’ Motion in Limine to Exclude Testimony of Marcia Williams and Richard Fortuna (Dkt. # 1538) (“Motion to Exclude”). Ms. Williams and Mr. Fortuna’s testimony is entirely appropriate and admissible for the very reasons identified in Plaintiffs’ Motion to Exclude: they will testify to “the policy implications for a ruling adverse to Defendants” and to their opinion that given such a ruling “bad things would happen.” Motion to Exclude 1-2. This testimony will assist the Court by placing complex statutory and administrative schemes in context, and in illustrating the potential consequences of adopting Plaintiffs’ statutory construction. In fact, in *United States v. Recticel Foam Corporation*, 858 F. Supp. 726, 731, 733 (E.D. Tenn 1993), the Court not only adopted Ms. Williams’ substantially similar testimony, but praised it as “enlighten[ing],” “persuasive and credible.” *Id.* at 731-33.

Ms. Williams and Mr. Fortuna offer precisely the sort of fact-based opinion testimony contemplated by the Federal Rules of Evidence,¹ and precisely the sort of experience-informed expertise most helpful to a court weighing the discretionary and subjective elements of the preliminary injunction inquiry. Accordingly, Plaintiffs' Motion should be denied.

Marcia Williams has over 20 years experience administering and working with RCRA, and over 37 years experience in the broader environmental field. Indeed, Ms. Williams concluded her career with the EPA as Director of the Office of Solid Waste ("OSW"), where she directed the implementation of RCRA. Williams Aff. ¶¶2-6 (Exhibit 1). Ms. Williams was retained to address "the history and public policy considerations that EPA evaluated in addressing whether poultry litter is a 'solid waste' within the meaning of RCRA," as well as to review Oklahoma's and Arkansas's solid waste programs. *Id.* ¶¶14-15.

Ms. Williams first reviews the relevant statutory and regulatory framework implementing RCRA. For example, she notes Congress's intention that material actually be "discarded" in order to be "solid waste": specifically, the legislative history notes that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials." *Id.* ¶¶18-20. She notes the influence of this legislative history in shaping EPA's own repeated decisions to exclude animal manures from RCRA's definition of "solid waste." *Id.* ¶¶22-24. And she notes that Congress later declined to undo EPA's application of RCRA. *Id.* ¶¶38-40.

¹ Of course, as the Court has noted, the Tenth Circuit has held that the Rules of Evidence do not govern a preliminary injunction proceeding, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003), which leaves the precise basis for Plaintiffs' motion somewhat unclear.

But this discussion of the relevant legal framework is merely the background for Ms. Williams' discussion of various factors and policy considerations that shaped RCRA's and EPA's exclusion of animal manure. For example, EPA found it relevant that animal manure has been used for centuries as a soil builder. *Id.* ¶29. She notes EPA's efforts to distinguish "product-like" use and reuse from "waste-like" disposal. ¶41. Finally, she discusses properties of poultry litter and its application that are relevant to determining whether it is a RCRA "solid waste." *Id.* ¶¶56-57.

Mr. Richard Fortuna, currently President of Strategic Environmental Analysis, L.C., played a key role in developing the 1984 RCRA amendments, and served for 11 years as Executive Director of the Hazardous Waste Treatment Council. Fortuna Aff. at 2-4 (Exhibit 2). Mr. Fortuna likewise reviews the relevant legislative and regulatory background. He notes EPA's 1976 statement that RCRA's "solid waste" regulations would not apply to "agricultural wastes, including manures and crop residues returned to the soil as fertilizers or soil conditioners." *Id.* at 6-7. He also notes EPA's final RCRA rule, promulgated in 1979, which again excluded "agricultural wastes, including manures and crop residues returned to the soil as fertilizers or soil conditioners." *Id.* at 7-8. This language, he notes, remains unchanged in the CFR through the present day. *Id.* at 8-9.

Again, this review provides the necessary and relevant legal background for Mr. Fortuna's substantive opinions based on his professional experience with RCRA as a legislative aide and practitioner. With regard to RCRA's background, he notes that in 1984 no interested party or legislator questioned EPA's determination that animal manures returned to the soil as fertilizer or conditioner were not RCRA "solid waste." *Id.* at 10. He also notes that the exemption was fully considered and intentionally left

unaltered. *Id.* Mr. Fortuna separately reviews some facts that the Court may consider in determining whether litter is a discarded solid waste, including its fungibility for commercially available products. *Id.* at 12.

Finally, Mr. Fortuna discusses the prospective implications of Plaintiffs' construction of RCRA. Among other real-world impacts, Plaintiffs' position would require the landfilling of poultry litter, which in Mr. Fortuna's experience will be extremely difficult to accomplish. *Id.* at 23. Moreover, such a ruling could extend RCRA to various potential sources of bacteria such as biosolids, which are also land-applied and the volume of which dwarfs the production of litter. *Id.* at 24-24. Mr. Fortuna also discusses the impracticability of Plaintiffs' suggestion that litter be trucked out of the IRW. *Id.* at 25-26. In conclusion, Mr. Fortuna observes that in his experience, Plaintiffs' claim is unprecedented both in its scope and reach, particularly given the absence of factual evidence of widespread violations of State RCRA standards in either Oklahoma or Arkansas. *Id.* at 26-27.

Federal Rule of Evidence 702 invites expert testimony wherever the expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." As discussed in Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opposition" or "Opp."), a critical question in this case is whether poultry litter is a "solid waste" as defined in RCRA. Congress and EPA have excluded animal manures from RCRA's definition of "solid waste." But if this Court were to ignore that exclusion, it would then be faced with the factual question whether litter is a "solid waste" as defined by RCRA and the regulations and standards promulgated by EPA. This inquiry itself turns on a number of predicate factual questions

including whether litter is beneficially used and commercially valuable. Opp. at 4-13.

Facts and expertise that assist the Court in making such determinations are appropriate for expert testimony.²

For example, in *United States v. Cohen*, 518 F.2d 727, 737 (2d Cir. 1975), the Second Circuit upheld the admission of the expert testimony of a senior SEC official regarding the meaning of the statutory terms “underwriter” and “materiality.” The defendants in that case argued that this expert testimony improperly usurped the decisionmaking role. The Second Circuit disagreed, finding the testimony useful for bringing into focus “complex questions involving the securities laws” at issue in the case. *Id.* The Sixth Circuit reached the same conclusion in *In re Madeline Marie Nursing Homes*, 694 F.2d 433 (6th Cir. 1982), a case that raised entangled issues of bankruptcy, Medicaid, and state regulatory laws. The Sixth Circuit chastised the bankruptcy court for failing to avail itself of State witnesses who could have explained relevant State accounting procedures “because the court was convinced that it had an independent obligation to take judicial notice of the applicable law.” *Id.* at 445-46. In the Sixth Circuit’s view,

when the legal inquiry extends to a complex scheme such as Medicaid, and when the State regulations are not readily available in published form, court should not hesitate to seek out all of the practical assistance it can obtain in its function as ultimate determiner of the law.

² Plaintiffs suggest that Ms. Williams and Mr. Fortuna testify improperly when, after reviewing their facts and experiences, they state their own conclusions. Motion to Exclude 1, 3. This is wrong. Rule 704(a) expressly permits such testimony. *See* Federal Rule of Evidence 704(a) (“Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”). *Accord Karns v. Emerson Elec. Co.*, 817 F.2d 1452 (10th Cir. 1987).

Id. at 445. Similarly, courts have heard testimony from EPA officials on regulatory matters, *see United States v. American National Can Co.*, 126 F. Supp. 2d 521, 526-528 (N.D. Ill. 2000) (discussing the testimony of EPA officials regarding the Agency's interpretation of the regulatory term "renovation" in a suit brought under the Clean Air Act), and from other regulators, *see Paice v. Maryland Racing Comm'n*, 539 F. Supp. 458, 461-62 (D. Md 1982) (accepting testimony from state official regarding the state racing commission's practices and interpretations of state laws governing racing).

Courts routinely look to legislative history and related background materials and historical facts in order to place statutes in their proper context. These include materials and facts that experts can supply. An expert's opinion is not disqualified because the expert discusses relevant statutes, regulations, or caselaw as background to her opinion. Nor does discussing facts that may be considered by a court somehow make the opinion a usurpation of the judicial function.

The testimony offered in this case is consistent with these authorities. Far from purporting to interpret the law, it provides the Court with facts and policy considerations not otherwise available that are relevant to the statutory and regulatory questions before the Court. For example, Mr. Fortuna's testimony regarding the legislative process underlying the 1984 RCRA amendments includes the fact that Congress declined to amend EPA's policy of excluding from RCRA "agricultural wastes, including manures and crop residues returned to the soil as fertilizers or soil conditioners." Fortuna Aff. at 7-8, 10. This insight is relevant to understanding the Amendments, but is not otherwise available in the legislative history. If the Court rejects EPA's exclusion of animal manure from RCRA's definition of "solid waste," Mr. Fortuna's testimony supplies

factual considerations that have been considered by EPA and that are relevant to the Court's determination whether litter is a "solid waste." These considerations include its value as a commodity; its usefulness as an ingredient; the value of the recycled product; and the absence of significant harmful constituents not found in analogous products. *Id.* at 18. And finally, Mr. Fortuna discusses his expert opinions regarding the likely adverse effects of a ruling adopting Plaintiffs' construction of RCRA. *Id.* at 23-27. This is classic expert testimony, not legal direction to the Court.

Ms. Williams' testimony likewise regards EPA's "thinking and intent in developing various regulations and policy guidelines." Williams Aff. ¶12. This testimony does not dictate the Court's decision, but rather provides relevant background to inform that decision. For example, Ms. Williams notes that had EPA ever considered recycled animal manure to be a RCRA "solid waste," then the Environmental Impact Statement accompanying EPA's 1979 regulations would have discussed the environmental impact of its use. *Id.* ¶¶ 26-27. Ms. Williams also explains the close cooperation between OSW and the EPA Office of Water ("OW"), which had previously collected information on industries that affected water quality. *Id.* ¶¶50-52. Without this specialized knowledge it would not be obvious to the lay observer that OW's favorable view of the land application of manure is relevant to OSW's administration of RCRA. *Id.* at 51. Finally, Ms. Williams explains other factors EPA considers in determining the scope of RCRA and its definition of "solid waste." *Id.* ¶¶57. This discussion does not dictate the legal outcome but merely provides facts that inform it.

Plaintiffs' authorities generally support the unremarkable propositions that statutory interpretation is a question of law for the Court, *see, e.g., United States v.*

Montoya, 827 F.2d 143, 146 (7th Cir. 1987); *Pacific Land Resources Corp. v. Moench Inv. Co.*, 696 F.2d 88, 93 n.5 (10th Cir. 1982), and that pure legal argument submitted by purported experts who lack any specialized or personal knowledge of relevant underlying facts and circumstances is inappropriate, *see, e.g., Wollan v. United States Dep't of the Interior*, 997 F. Supp. 1397, 1403 (D. Col. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037 (D. Ariz. 2005); *United States v. Jungles*, 903 F.2d 468, 477 (7th Cir. 1990).³ But that is not the case here, where both Ms. Williams and Mr. Fortuna offer personal insights into the history and factors affecting the issues before the Court, testify to characteristics of poultry litter that may guide the Court's legal analysis, and discuss the policy and practical impacts of adopting Plaintiff's reading of RCRA.

Ms. Williams has given similar testimony in numerous other cases. *See Williams Aff. Tab A*, at 5. Despite several similar efforts to do so, Ms. Williams has never been excluded from testifying on this basis. Ms. Williams' testimony has been found extremely useful by other courts. For example, in *United States v. Recticel Foam Corporation*, 858 F. Supp. 726, 729 (E.D. Tenn 1993), Ms. Williams testified extensively regarding EPA's development and application of the "mixture rule," governing whether mixing hazardous and non-hazardous waste results in hazardous waste. The Court quoted extensively from Ms. Williams' testimony regarding EPA's deliberations, finding

³ Many of Plaintiffs' authorities are too opaque to be of any assistance. For example, the brief statement excluding an affidavit in *Mycogen Plant Science, Inc. v. Monsanto Co.*, 1995 WL 1612537 (S.D. Cal. Sep. 22, 1995), provides information regarding neither the substance of the testimony nor the qualifications of its author. Others are not even remotely on point. In *Kansas v. Colorado*, 1994 WL 16189353 at *155 (U.S. Oct. 3 1994), an affidavit was excluded on account of being hearsay, and in *United States v. Banks*, 2008 WL 276053 (10th Cir. Feb. 1, 2008), a witness was excluded after being submitted under Rule 701, when he should have been submitted under Rule 702 and complied with its requirements.

it “enlighten[ing],” “persuasive and credible.” *Id.* at 731-33. Mr. Fortuna has likewise never been excluded from testifying regarding his experiences and knowledge of various environmental statutes and his testimony has similarly been found insightful and helpful by courts.

CONCLUSION

For the foregoing reasons, Plaintiff’s Motion in Limine to Exclude Testimony of Marcia Williams and Richard Fortuna should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th day of February 2008, I electronically transmitted Defendants' Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction (Dkt # 1531) to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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